STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0827
A11-1375

Sheehy Construction Company,
Respondent,

vs.

City of Centerville,
Appellant.

Filed May 14, 2012
Affirmed as modified
Hudson, Judge

Anoka County District Court
File No. 02-CV-09-5300

Dean B. Thomson, Kristine Kroenke, Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, Minnesota (for respondent)

Kurt Glaser, Smith & Glaser, LLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant city challenges the district court's judgments setting aside and remanding a special assessment adopted with respect to real property owned by respondent construction company and granting respondent its associated costs and

disbursements. We affirm the district court's judgment relating to the assessment, as modified to correct a mathematical error, and affirm the judgment relating to costs and disbursements.

FACTS

In 2009, the city council of appellant City of Centerville adopted a special assessment of $379,000 relating to an approximately 5-acre parcel of property owned by respondent Sheehy Construction Company. The assessment related to a city development project, which included construction of an east-west road to the immediate south of Sheehy's property, between 20th and 21st Avenues; construction of sanitary sewer and water-main connections to Sheehy's property; realignment of a drainage ditch located on city property; and additional wetland and drainage improvements. The project also allowed the city to fill portions of previously acquired property, which was located to the west of Sheehy's property, for the purpose of constructing three new lots suitable for commercial development.

In 2006, in connection with the project, the city had instituted an eminent-domain proceeding, which resulted in the condemnation of approximately 1.6 acres of Sheehy's 5-acre parcel of property. As a result of that proceeding, Sheehy signed a settlement agreement accepting a commissioners' panel recommendation of $200,000 as damages for the taking. The property acquired by eminent domain was comprised mostly of wetlands located immediately to the south of Sheehy's current parcel.

Sheehy objected to the 2009 assessment and appealed to district court, alleging, among other things, that the assessment amounted to an unconstitutional taking because

the amount of the assessment exceeded the benefit to the property. At a bench trial, the city presented the testimony of its appraiser, William Schwab, who had also conducted the appraisal for the 2006 condemnation proceeding. In his 2006 condemnation appraisal, Schwab noted that 65% of the property was located in a flood zone. Here, Schwab testified that he arrived at the before-project value for the special assessment by dividing the $200,000 condemnation award by the square footage of the amount taken, and then applying that $2.77-per-square-foot value to the property remaining after the condemnation, which resulted in a value of $550,000.

With respect to the post-project value of the property, Schwab noted that the property would no longer be subject to flooding and would therefore not be restricted by a Rice Creek Watershed District (RCWD) flooding easement. He testified that the removal of the easement provided a benefit to Sheehy, but that if the project were not necessary to remove the easement, that portion of the project would not have provided a benefit. Schwab also assigned a value of $145,000 to an existing pole barn on the property. Schwab's post-project appraisal valued the property after the project at $6.30 per square foot, for a total value of $950,000. He therefore opined that the special assessment resulted in a benefit to the property of $400,000, which he then reduced to the assessed figure of $379,000.

Sheehy presented evidence from its appraiser, Ellen Herman. To support Herman's appraisal, Sheehy sought to introduce evidence from an additional expert, Jeffrey Shopek. Shopek, a civil engineer, had developed an engineering plan that would provide sewer and water to the property in a different fashion from the city's project.

Shopek's plan also provided for RCWD's removal of the floodplain easement in light of a 1999 change in the floodplain, which removed most of Sheehy's property from the floodplain. The city moved in limine to exclude Shopek's opinion, arguing that testimony on the RCWD's potential removal of the floodplain easement was speculative, and that because the proposed engineering plan was hypothetical, it did not relate to the actual benefit conferred by the project. The district court permitted Shopek's testimony, but limited its use to foundation for Herman's appraisal.

Shopek testified that without the city's new lots added to the project, it would not have been necessary from an engineering standpoint to "loop" the water line extended to Sheehy's property to connect it in more than one direction. He suggested a less-expensive plan that would have connected sanitary sewer and water to Sheehy's property by bringing those connections along 21st Avenue to the south end of the property. He also testified that, after the floodplain elevation was revised in 1999, "just a small sliver" of Sheehy's property remained in the floodplain. He testified that he estimated that the City of Lino Lakes, which adjoins Sheehy's property on its east side, would likely contribute $59,000 to fund a portion of the proposed infrastructure, so that its total cost to the city would be approximately $135,000.

Herman testified regarding her appraisal. She opined that, based in part on the property's location outside the floodplain, its highest and best use both before and after the project was as commercial property. She used vacant properties with existing infrastructure improvements as comparables. To arrive at a pre-project value, she used a value of $7.25 per square foot. She then deducted $135,000 for constructing the

improvements proposed by Shopek and $25,000 for the cost of removing the pole barn, which she believed to have minimal value. She also added a credit of $26,000, based on the estimated value of a previous assessment for work performed on Sheehy's property in 1998, for a total pre-improvement value of $946,000. Herman valued the property post improvement at $1,110,000. She concluded that the project conferred a special benefit of $164,000.

The city and Sheehy both presented testimony by water-resources experts. Nicholas Tomczik, a permit coordinator with the RCWD, testified for the city that some of Sheehy's property remains in the 100-year floodplain and that the RCWD board does not always follow staff recommendations about matters such as removing easements. Sheehy presented the testimony of Carl Almer, a former water-resources engineer at RCWD, who testified that the designated floodplain elevation had changed in 1999 and that in 2005, when he worked at RCWD and reviewed a wetland delineation for the city's purchase of related property, no portion of Sheehy's property was designated as wetland. He testified that, at that time, RCWD had no knowledge of an existing wetland easement, that he would have recommended release of such an easement, and that the RCWD board followed his recommendations "[a]lmost without exception."

The district court found that Herman's appraisal provided the most accurate and fair representation of the property's market value after the project, and, with some adjustment, before the project. The district court found that the per-square-foot value of the 2006 condemnation award, on which Schwab based his opinion in this matter, did not provide an accurate and fair representation of the property's pre-project market value

because the 2006 condemned property contained mostly wetland and because the settlement agreement did not necessarily indicate the price that a willing buyer and seller would reach for the purchase of the property. The district court found that the 1999 removal of the floodplain designation undermined Schwab's analysis of the highest and best use of the property and his opinion that the project's removal of the ponding and flowage easement would provide a special benefit to the property.

The district court found Herman's testimony on the highest and best use of the property to be credible and credited her post-project valuation. The district court, however, rejected two aspects of Herman's pre-project valuation: her use of an assessment credit previously provided to Sheehy by the city and the assumption that Lino Lakes would pay for half the cost of constructing Shopek's proposed improvements. The district court determined that the property's pre-improvement value was $869,000, and the special benefit from the project amounted to $241,000. The district court declined to consider whether specific, individual aspects of the project provided benefits to the property, stating that it was evaluating the project as a whole, based on its special benefit, as measured by the change in market value before and after the project. The district court therefore set aside the city's assessment and directed the city to reassess the special benefit in an amount not exceeding $241,000.

Sheehy served its notice of taxation of costs and disbursements to the court administrator, who awarded costs of $1,364.88. Both Sheehy and the city appealed to the district court; both parties requested a hearing, which the district court denied. The district court issued its order granting Sheehy $56,830.76 in costs and disbursements.

The city's consolidated appeal of the judgments relating to the special assessment and to costs and disbursements follows.

D E C I S I O N

I

As a preliminary, procedural matter, the city argues for the first time on appeal that Sheehy is precluded from challenging the city's assessment because Schwab's appraisal is based on the earlier 2006 condemnation award, which, it argues, has collateral-estoppel effect in this proceeding. As the city acknowledges, it did not raise this argument before the district court. This court will not generally address issues not raised before, and considered by, the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The city argues, however, that because the preclusive effect of the 2006 condemnation award is dispositive, it may be considered for the first time on appellate review. *See Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997) (stating that issues not raised before district court may be considered on appeal if they are "plainly decisive of the entire controversy on its merits" and when "there is no possible advantage or disadvantage to either party in not having had a prior ruling by the [district] court" (quotation omitted)). We reject this argument for two reasons. First, even if all of the requirements for applying the doctrine of collateral estoppel are satisfied, the district court still has discretion to decline to apply the doctrine. *Pope Cnty. Bd. of Comm'rs v. Pryzmus*, 682 N.W.2d 666, 669 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004); *see AFSCME Council 96 v. Arrowhead Reg'l Corrs. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984) (stating that collateral estoppel is not rigidly applied and is rejected or

qualified when its application would contravene overriding public policy); *see also Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996) (noting that "collateral estoppel is not rigidly applied" and stating that "[a]s a flexible doctrine, the focus is on whether its application would work an injustice on the party against whom estoppel is urged" (quoting *Johnson v. Consol. Freightways, Ins.*, 420 N.W.2d 608, 613–14 (Minn. 1988) (quotation marks omitted)).

Second, there is a significant difference in the character of the property involved in these two proceedings. We acknowledge that the district court received evidence of the 2006 condemnation award in the context of Schwab's appraisal. But the district court was not bound to determine the special benefit of the current project based solely on that award, which involved a portion of Sheehy's property that consisted mostly of wetlands. We therefore decline to consider the city's collateral-estoppel argument based on *Thiele*.

Substantively, the city argues that the district court abused its discretion by admitting Shopek's testimony because that testimony failed to meet the evidentiary foundational requirements to admit evidence based on the "development-cost approach" to market value as articulated in *Buzick v. City of Blaine*, 491 N.W.2d 923 (Minn. App. 1992), *aff'd*, 505 N.W.2d 51 (Minn. 1993).[1] Specifically, *Buzick* requires that before the

[1] The supreme court has recognized that, in certain circumstances, in determining the value of a special benefit conferred on assessed property, courts may consider property appraisals based on a development-cost approach. *Cnty. of Ramsey v. Miller*, 316 N.W.2d 917, 919–20 (Minn. 1982). Such an approach "is designed to reflect, through cash flow analysis, the current price a developer-purchaser would be warranted in paying for the land, given the cost of developing it and the probable proceeds from the sale of developed sites." *Id*. at 920. We have previously affirmed the district court's exclusion of evidence on the development-cost approach for lack of foundation, when calculations

development-cost approach may be used, traditional methods of valuations must be inadequate. *Buzick*, 491 N.W.2d at 926. The district court did not address *Buzick*. Sheehy contends that our consideration of this issue is inappropriate because the city failed to raise it before the district court. *See Thiele*, 425 N.W.2d at 582. Even if we concluded that the city adequately raised its objection to Shopek's testimony by its motion in limine, we would still be foreclosed from addressing this argument because the city failed to seek a new trial or amended findings based on its asserted error in the district court's evidentiary ruling.

The Minnesota Supreme Court has recently reiterated that "a motion for a new trial or amended findings is a prerequisite to appellate review regarding matters of 'trial procedure, evidentiary rulings, and jury instructions' that arise 'during the course of trial.'" *Cont'l Retail, LLC v. Cnty. of Hennepin*, 801 N.W.2d 395, 399 (Minn. 2011) (quoting *Alpha Real Estate Co. v. Delta Dental Plan*, 664 N.W.2d 303, 310 (Minn. 2003)) (other quotation omitted). Therefore, "evidentiary rulings made at trial must be assigned as error in a motion for a new trial or amended findings in order to properly preserve an objection for appellate review," and "failure to bring such a motion precludes appellate review." *Id*. This rule applies to assessment proceedings. *See Am. Bank of St. Paul v. City of Minneapolis*, 802 N.W.2d 781, 790 (Minn. App. 2011) (in appellate

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used in an appraisal were based on speculation as to when market demand would support profitable development. *Buzick v. City of Blaine*, 491 N.W.2d 923, 926–27 (Minn. App. 1992), *aff'd*, 505 N.W.2d 51 (Minn. 1993). Because the city's arguments on the development-cost approach were not asserted in a motion for a new trial, we do not address the issue of whether Shopek's testimony, admitted as foundation for Herman's appraisal, constituted development-cost evidence.

review of street assessment, declining to address evidentiary objections on ground that appellant failed to raise objections in motion for new trial). Therefore, we conclude that the city's failure to move for a new trial or amended findings based on the district court's evidentiary ruling allowing Shopek's testimony as foundation for Herman's appraisal precludes our review of this issue.

II

"A special assessment is a tax, intended to offset the cost of local improvements such as sewer, water and streets, which is selectively imposed upon the beneficiaries." *Dosedel v. City of Ham Lake*, 414 N.W.2d 751, 755 (Minn. App. 1987). A municipality may assess "[t]he cost of any improvement, or any part thereof . . . upon property benefited by the improvement, based upon the benefits received." Minn. Stat. § 429.051 (2010). "A municipality's power of assessment, however, is limited by three conditions: (1) the land must receive a special benefit from the improvement being constructed; (2) the assessment must be uniform upon the same class of property; and (3) the assessment may not exceed the special benefit." *David E. McNally Dev. Corp. v. City of Winona*, 686 N.W.2d 553, 558 (Minn. App. 2004) (citing *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 369, 240 N.W.2d 517, 519 (1976)).

The district court's standard of review of a special assessment varies according to the challenge asserted. *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 202 (Minn. 1979). If a property owner challenges matters within the city's legislative discretion, such as the proportionate distribution of the total costs of an improvement, the determination of the area benefitted by the project, or the regularity of the assessment process, the district

court exercises a clearly-erroneous standard of review. *Id*. at 203. But if the issue presented is whether an assessment exceeds the special benefit to that property, so as to determine whether an unconstitutional taking has occurred, the district court's "[d]ecision must be based upon independent consideration of all the evidence." *Id*.

An assessment is presumed to be legally valid, and evidence of an assessment roll constitutes "prima facie proof that the assessment does not exceed special benefit." *Carlson-Lang*, 307 Minn. at 370, 240 N.W.2d at 519. Appealing parties can overcome this presumption by introducing competent evidence that the assessment is greater than the benefit. *Id.*; *McNally*, 686 N.W.2d at 559. Once the presumption is rebutted by introducing adverse evidence on the question of value, the district court weighs conflicting evidence on the value of the benefit conferred. *Buettner*, 277 N.W.2d at 204; *see In re Meyer*, 176 Minn. 240, 243, 223 N.W. 135, 136 (1929) (stating that evidence to rebut the presumption of validity "raises an issue of fact upon which normally the decision of the trier of fact will be final").

The city initially argues that, to the extent that Herman's appraisal relied on Shopek's testimony, Sheehy's assessment appeal challenged the city's project–design decision, a legislative function, so that the district court should have examined the city's assessment decision under a clearly-erroneous standard, rather than making an independent consideration of all the evidence. We disagree. Although Sheehy raised various arguments, including a challenge to the apportionment of benefits, the main thrust of Sheehy's argument was that the assessment exceeded the special benefit to the property. *See In re Vill. of Burnsville Assessments*, 287 N.W.2d 375, 376–77 (Minn.

1979) (reiterating de novo standard of review of municipality's decision when "the main thrust" of property owner's argument was focused on claim of absence of benefit to assessed property). We also note that Sheehy did not contest the city council's assessment decision in the context of an adversary hearing. *See Tri-State Land Co. v. City of Shoreview*, 290 N.W.2d 775, 778 n.2 (Minn. 1980) (citing *Buettner* and concluding that, because property owner was not contesting regularity of city-council proceeding and assessment was not adopted in adversary proceeding, limited scope of review did not apply). We therefore conclude that, on this record, the district court appropriately exercised its independent review to determine whether Sheehy's appraisal evidence was sufficient to overcome the city's "prima facie proof" that the assessment did not exceed the special benefit to its property.[2] *Carlson-Lang*, 307 Minn. at 370, 240 N.W.2d at 519.

III

We therefore address the merits of the city's challenge to the district court's findings, conclusions, and judgment challenging the special assessment. This court conducts appellate review of the district court's decision by examining the record to determine whether the evidence as a whole supports the district court's findings. *Id.* at

[2] The city also argues that, although Sheehy made an apportionment objection on appeal to the district court, it did not present expert testimony on such a challenge before the city council. But we conclude that Sheehy's additional evidence presented to the district court was appropriate and relevant to the central issue addressed by the city council: whether the assessment exceeded the special benefit to the property. *See Uniprop Manufactured Hous.*, 474 N.W.2d 375, 379 (Minn. App. 1991) (stating that district court may consider new or additional evidence that is relevant to issues raised and considered before municipal decision-making body), *review denied* (Minn. Oct. 11, 1991).

373, 240 N.W.2d at 521. We defer to the district court's determinations regarding the weight and credibility of expert evidence. *Alstores Realty, Inc. v. State*, 286 Minn. 343, 353, 176 N.W.2d 112, 118 (1970).

"[S]pecial benefits [are] measured by considering the increase in the market value of the property attributable to the improvement." *Am. Bank of St. Paul*, 802 N.W.2d at 785. Market value is the amount that a willing buyer would pay to a willing owner, taking into account the property's highest and best use. *Cnty. of Ramsey v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982). The district court found that it could not rely on the city's appraisal evidence because Schwab's appraisal did not provide a fair approximation of the increase in value of Sheehy's property due to the project. The district court found that, with two exceptions, Herman's general methodology provided a fair and accurate approximation of the pre- and post-improvement value of the property. The district court therefore credited Herman's appraisal, with the exception of her pre-project use of a credit provided to Sheehy with respect to an earlier assessment and her assumption that the City of Lino Lakes would contribute to private improvements constructed on the east side of Sheehy's property.

Schwab's appraisal

The city argues that the district court erred by discrediting Schwab's appraisal of the pre-improvement value of the property at $2.77 per square foot. Schwab acknowledged that this figure was based on his previous appraisal of Sheehy's additional property taken in the 2006 condemnation proceeding. The district court found that the per-square-foot value of the portion of the property taken in the 2006 condemnation

action did not provide an accurate and fair representation of the pre-improvement market value of the remainder of the property. The district court cited Schwab's testimony that about 65% of the property was located within a flood zone, which affected his opinion of the property's highest and best use. But the district court found that the floodplain designation on Sheehy's property had actually been reduced in 1999, removing nearly all of the property from the floodplain.

The city argues that the district court misinterpreted Schwab's appraisal, citing his testimony that he assumed for valuation purposes that Sheehy's property was all located on high ground. But Schwab testified that "[a]t the time [he] did the appraisal for the Sheehy property, [he] believed it was in the floodplain." This statement is consistent with Schwab's 2006 condemnation appraisal, which examined the whole of Sheehy's property, stated that the property's highest and best use was for cold storage, and recommended that, under a current flood restriction, the property could be used for storage of materials that could be readily removed in case of a flood warning.

The city also maintains, based on the testimony of Tomczik, an RCWD permit coordinator, that any evidence of increased property value due to removal of the ponding and flowage easement would be speculative because Sheehy would need to seek approval of a formal development plan before the easement could be removed. But the district court credited the testimony of Almer, the water resource engineer and former RCWD employee, who testified that there was no engineering reason not to recommend release of the easement given that the floodplain designation had changed and that the RCWD board followed his recommendations nearly 100% of the time. This court defers to the

district court's credibility determinations, *Alstores*, 286 Minn. at 353, 176 N.W.2d at 118, and we conclude that the evidence sustains the district court's findings rejecting Schwab's appraisal and crediting Almer's testimony on the release of the flooding easement.

Herman's appraisal

The city also argues that the district court erred by crediting Herman's appraisal, maintaining that it is unreliable because she used valuation comparables of property already improved with infrastructure, rather than completely unimproved property. The supreme court has observed that "the priority and quantum of reliance [on a valuation approach] depends on the facts of each case." *Lewis & Harris v. Cnty. of Hennepin*, 516 N.W.2d 177, 180 (Minn. 1994). The district court found that although "generally speaking, a market analysis of sales of similar unimproved properties would be more useful. . . . Given that the court has determined that it cannot rely on those sales selected by Schwab, the court has no such market analysis before it." In this context, based on the district court's findings and the record evidence, we conclude that the district court did not err in determining that Herman's approach generally "result[ed] in a fair approximation of the increase in market value" due to the assessment. *Eagle Creek Townhomes, LLP v. City of Shakopee*, 614 N.W.2d 246, 251 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 13, 2000).

The city also argues that Herman's appraisal did not provide the court sufficient evidence on which to base the two adjustments it made in the pre-improvement value of the property; specifically, the removal of a $26,000 credit to Sheehy from the city based

on a previous assessment, and a $51,000 credit based on the estimate of costs that would be contributed to Shopek's proposed infrastructure by the City of Lino Lakes. The factfinder may accept or reject all or part of an expert's opinion. *Kundiger v. Prudential Ins. Co. of Am.*, 219 Minn. 25, 29, 17 N.W.2d 49, 52 (1944). The district court found that, although the city did provide such a previous-assessment credit to Sheehy, there was no evidence that the city had an obligation to do so. The district court also found that there was insufficient evidence to support Herman's conclusion that the City of Lino Lakes would contribute one-half the costs of constructing improvements on the east side of Sheehy's property. The record supports the district court's findings that these two credits were not properly included in the pre-improvement market value of the property.

The city also argues that the district court improperly failed to consider the cost of acquiring land from the city or from Lino Lakes, which would be required to construct the improvements specified in Shopek's testimony. But Shopek's testimony was admitted only as foundation for Herman's appraisal, neither party presented evidence on this issue, and the district court appropriately did not speculate by making findings on the possible cost of such an acquisition.

The city additionally contends that the district court made mathematical errors in adjusting Herman's pre-improvement appraisal to arrive at the benefit conferred by the special assessment. The district court adjusted Herman's pre-improvement appraisal downward by $77,000 to reflect its disallowance of a $51,000 Lino Lakes credit and the $26,000 previous-assessment credit. We agree with the city that the district court clearly erred by subtracting only $51,000 for the Lino Lakes credit. Shopek testified that the

City of Lino Lakes would contribute $50,000 to the street construction portion of the project and $9,000 to the storm sewer portion. Therefore, the district court should have subtracted the full amount of that credit, $59,000, from the pre-improvement value of the property.

The city also argues that some of the district court's findings on the special benefit conferred fail to reflect the district court's removal of the $26,000 assessment credit from the city. But as Sheehy argues, any error in this regard is harmless because the district court made a "bottom line" increase to Herman's special-benefit figure, based on the disallowance of the Lino Lakes and the previous-assessment credits. We therefore affirm the district court's judgment setting aside the assessment and ordering a reassessment of the special benefit to Sheehy's property, as modified to reflect our correction of the mathematical error noted above. Accordingly, any reassessment shall not exceed $249,000.

IV

The city argues that the district court erred by denying its request for an evidentiary hearing on costs and disbursements. Although Sheehy contends that the city failed to raise this issue before the district court, the record establishes that the city requested a hearing on this issue.

Under Minn. R. Civ. P. 54.04, a party who seeks to recover costs and disbursements files a sworn application for the taxation of costs and disbursements. Minn. R. Civ. P. 54.04(b). An objecting party may file written objections, specifying the grounds for those objections. Minn. R. Civ. P. 54.04(c). We have previously concluded

that "[t]o make sufficient findings of the reasonableness of costs and disbursements, . . . the [district] court must take oral testimony . . . so a full record is available for review." *Quade & Sons Refrigeration, Inc. v. Minn. Mining & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994) (quotation omitted), *review denied* (Minn. Mar. 15, 1994). But the supreme court has noted that Minn. R. Civ. P. 54.04 does not require the district court to conduct a hearing to determine the reasonableness of costs and disbursements. *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537, 543 (Minn. 1994).

Sheehy submitted detailed affidavits in support of its motion for costs and disbursements, and the city submitted a thorough memorandum in opposition to the motion. The district court issued specific findings stating its reasons for allowing some claimed costs and disbursements and rejecting others. Under these circumstances, the district court did not err in declining to hold a hearing on this issue, and we affirm the district court's judgment relating to costs and disbursements.

Affirmed as modified.